

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

MEADE COUNTY RURAL ELECTRIC
COOPERATIVE CORPORATION

and

BRANDENBURG TELEPHONE COMPANY, INC.

ALLEGED FAILURE TO COMPLY WITH
COMMISSION REGULATIONS

CASE NO. 89-257

O R D E R

On September 19, 1989 an Order to Show Cause was issued by the Commission against Meade County Rural Electric Cooperative Corporation, Inc. ("Meade County RECC") and Brandenburg Telephone Company ("Brandenburg Telephone"). The Order was issued on the basis of an electrical utility accident investigation report filed August 21, 1989 by a utility investigator employed by the Commission. The report charged Meade County RECC with violation of 807 KAR 5:041, Section 3, and Brandenburg Telephone with violation of 807 KAR 5:061, Section 2. Both regulations require utilities to comply with the standards of the 1981 edition of the National Electric Safety Code. The report charged both utilities with owning and maintaining overhead wires which did not meet the minimum vertical clearance standards prescribed by Section 232a of the electric code. The Order directed both utilities to appear and

show cause why they should not be subject to the penalties of KRS 278.990 for failure to comply with Commission regulations.

Statement of Facts

Meade County owns, controls, operates and manages facilities used in the transmission or distribution of electricity to or for the public for lights, heat, power or other uses. Brandenburg Telephone owns, controls, or operates facilities used in connection with the transmission or conveyance over wire of any message by telephone. Both are utilities under the jurisdiction of this Commission.

On August 7, 1989, the Commission was notified of an accident in the Guston community of Meade County involving overhead wires owned by both utilities. The accident occurred on August 4, 1989 when Matthew Rosebush, a 9-year old minor child, was burned when an aluminum pole thrown across an overhead electric line owned and operated by Meade County RECC came into contact with him. The injury occurred on property belonging to Eric Riggs and his wife, Heidi Riggs. The Riggs property adjoins property belonging to Joseph M. Rosebush and Ina Mae Rosebush, the parents of Matthew Rosebush.

The Riggs property lies adjacent to the south side of Hill Grove Road, a public highway in Meade County. The Rosebush property lies immediately to the south of the Riggs property and does not have any frontage along the public highway. To gain entry to and from their property, the Rosebushes use a 30-foot right-of-way from the Hill Grove Road along the west line of the Riggs property. Both the Rosebush property and the Riggs property receive

electric service from Meade County RECC and telephone service from Brandenburg Telephone. Service is provided through overhead wires running from the Hill Grove Road and it is these wires that are the subject of this proceeding.

The overhead wires which provide service run along the east line of both the Riggs and Rosebush properties and are strung between a utility pole on the south right-of-way line of Hill Grove Road in the northeast corner of the Riggs property to a second utility pole 360 feet away in the Rosebush east line. There are three lines, two electric and one telephone, attached to the poles at different levels.

The topmost line is owned by Meade County RECC and serves as a 7200 volt electric distribution conductor. The middle line, also owned by Meade County RECC, serves as a neutral wire. The bottom, or third line, is owned by Brandenburg Telephone and serves as a telephone communications conductor. The telephone wire is the only one of the three that is covered. Apparently the accident occurred when the metal pole thrown over the line made contact with the electric distribution conductor and at the same time struck Matthew Rosebush.

The utility poles and lines were constructed by Meade County RECC in 1975. The poles are supported by guy wires which are attached to rock anchors buried beneath the ground. One of the guy wires supporting the pole adjacent to Hill Grove Road apparently came loose from the rock anchor to which it had been attached, causing the pole to shift, or lean, in the direction of the other pole. The shifting of the pole, in turn, loosened the

wires and caused them to sag in the middle. When the utility investigator for the Commission measured the height of the lines at the site of the accident, he found that the 7200 volt electrical distribution line had a vertical clearance of 13 feet, 7 inches above the ground, that the electrical neutral line had a vertical clearance of 11 feet above the ground and that the telephone communications line had a vertical clearance of 7 feet, 7 inches above the ground.

There is conflicting testimony concerning the length of time that the sag in the lines was in existence. Prior to the accident, the lines were inspected in accordance with Commission regulations by both utilities every two years. Meade County RECC conducted its last inspection by helicopter in June 1988 and reported no deficiencies in the lines. Brandenburg Telephone conducted its last inspection by foot in August 1987 and also reported no deficiencies. In addition, at the time of the investigation, there was a gap in the ground next to the pole which would be an indication that the pole had recently moved.

Nevertheless, despite the inspection reports and the evidence of recent movement of the pole, the evidence clearly establishes that the sag in the line had existed for several years and that it had become progressively worse with time.

Heidi Riggs testified during the course of her deposition that when she and her husband moved to the property in 1983 the line had already begun to sag. Although she could not estimate in feet and inches the vertical clearance of the lines, she stated that the lowest line was approximately a foot to a foot and a half

above her husband's hand when he raised his arm upright over his head. As time passed, the lines sagged lower and lower to the ground, to the point where her husband, who is six feet tall, could put his arm over the lowest line.

The Riggs also maintain a garden upon their property beneath the site where the accident occurred. Mrs. Riggs stated that the ground for the garden was broken and disked each year by a neighbor using a tractor and other farm implements. In the past two or three years, because the lines had sagged so low, the tractor could not pass beneath the lines until her husband lifted them with a stick. Her testimony was corroborated by Roscoe Hinton, the neighbor who prepared the garden. He stated that he was generally on the property two to three times a year and because the lines had sagged so low to the ground, he could not pass beneath them with his tractors unless Mr. Riggs lifted them with a stick.

Both utilities state they have no records that either the Rosebushes or the Riggses ever reported the condition of the lines to them. However, Heidi Riggs testified that she reported the condition to Meade County RECC by telephone, first in February of 1986 and then a few weeks later. The first conversation took place when Mrs. Riggs called Meade County RECC to request they remove a tree that was close to the overhead lines. Mrs. Riggs was referred to the service department and during the course of the conversation concerning the tree she also told the service department that the lines were low and needed to be raised. The service department promised to make out a work order to rectify the problem. After a period of time had elapsed and Meade County

RECC did not remove the tree or raise the wires, the Riggses removed the tree on their own. Mrs. Riggs then called Meade County RECC to inform them that the tree had been cut. She was advised that the work order had been lost and there was no record of her earlier call.

In addition, Joseph Rosebush testified that in March 1989, during the installation of a new electric service to his home by Meade County RECC, he discussed the condition of the lines with Albert Morgan, an employee of the utility installing the service. Mr. Rosebush stated that Mr. Morgan told him something must have snapped to cause the wires to sag and that he would have someone look at them. Mr. Rosebush's testimony was refuted by Jeffrey Embry, the district superintendent for Meade County RECC, who testified that he discussed with Albert Morgan the conversation that he had with Joseph Rosebush. Jeffrey Embry stated that Albert Morgan told him that the discussion was about a neutral line that went past the Rosebush property and was deenergized, and not the line in question. The conversation between Jeffrey Embry and Albert Morgan, however, took place after the accident and after the conversation was reported to Mr. Embry during an informal conference with the Commission.

After weighing the testimony of all witnesses, it is our opinion that Meade County RECC was notified through its employees of the condition of the wires before the accident. The first notification occurred when Heidi Riggs telephoned Meade County RECC to request the removal of a tree which presented a possible hazard to the lines. The second notification occurred when Joseph

Rosebush discussed the condition of the lines with the Meade County RECC employee installing service to his home.

Conclusions of Law

807 KAR 5:001, Section 3, and 807 KAR 5:061, Section 2, adopt by reference the requirements of Section 232a of the National Electric Safety Code. That section of the electric code requires open supply line electrical conductors carrying 750 volts to 15 kilovolts, which cross over "land traversed by vehicles, such as cultivated, grazing, forests, orchard, etc.," maintain a minimum vertical clearance of 20 feet. If the span exceeds 250 feet, the minimum vertical clearance is increased by 1 tenth of 1 foot for every 10 feet. The 7200 volt electric distribution conductor is in this category. Because the span between the poles in this case was 360 feet, the minimum clearance for the electrical conductor required by the electric code was 21.1 feet. Since the actual vertical clearance of the 7200 volt electric conductor owned and maintained by Meade County RECC at the time of the accident investigation was only 13 feet, 7 inches, the conductor was in violation of the code.

The electric neutral line and the telephone conductors were also in violation of the electric code. The minimum clearance required by the electric code for the neutral conductor and the telephone conductor was 18 feet. In contrast, the actual clearance was only 11 feet for the neutral conductor and 7 feet, 7 inches for the telephone communications wire.

During the course of the proceeding, the contention was made that the land beneath the overhead lines falls into a different

category than that used by the Commission in issuing the Order to Show Cause. Brandenburg Telephone maintains that the proper classification for the Riggs and Rosebush property was a "space or way accessible to pedestrians only." This position ignores the fact that the site where the accident took place was cultivated land traversed by vehicles two or three times a year. Nevertheless, the overhead lines did not meet the minimum vertical clearance required in this category.

The minimum vertical clearance required for the electric conductor and the neutral conductor over land "accessible to pedestrians" is 15 feet, provided the span does not exceed 250 feet. Where, as in this case, the span is 360 feet, the minimum vertical clearance for the electrical conductor is increased by 1 tenth of 1 foot for each 10 feet of span to 16.1 feet. Since the actual clearance for both electrical lines was less than was required in this category they were both in violation of the electric code no matter which classification is used.

The same is likewise true for the telephone conductor in this category. The minimum clearance required for "land accessible to pedestrians only" is 8 feet. This, too, is more than the minimum clearance of Brandenburg Telephone's conductor above the Riggs property where the accident occurred. Thus, regardless of which category the Riggs and Rosebush properties are classified under, the three overhead wires did not comply with the electric code when the accident investigation was made.

KRS 278.040 empowers the Commission to regulate all public utilities that are within its jurisdiction and to promulgate rules

and regulations to implement its authority and require utilities to conform to them. It is under that authority that the Commission has adopted 807 KAR 5:041, Section 3, and 807 KAR 5:061, Section 2. Furthermore, KRS 278.990 authorizes the Commission to assess a penalty of not less than \$25 nor more than \$1000 against any utility within its jurisdiction for each failure to comply with Commission regulations.

The principal defense raised by both utilities is that they did not know and had no reason to know the condition of the electrical wires at the time of the accident. Therefore, even though the wires may have been in violation of the applicable regulations, the utilities contend that they were not in violation of the law, and are not subject to the sanctions imposed by KRS 278.990(1).

Although KRS 278.990(1) does not require notice or knowledge of the violation as a condition precedent to imposing a penalty, the nature of the statute would seem to require it. In 70 CJS Penalties, Section 2, a penalty is defined as:

[a] sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done.

Generally, civil penalties are assessed to enforce legislative policies as reflected by statute. 70 CJS Penalties, Section 2. As such, they are penal in nature and defenses applicable to criminal charges are likewise applicable to civil penalties.

It is a defense to a criminal charge that the criminal conduct or omission was committed by accident and was a non-negligent

act. 22 CJS Criminal Law, Section 47. In 65 CJS Negligence, Section 51(1), "negligence" is defined as follows:

Accordingly, the general rule is that, in order that an act or omission may be regarded as negligent, the person charged therewith must have knowledge or notice that such act or omission involved danger to another, or that there was some defect or danger in the instrumentality or property causing the injury. In the absence of actual knowledge, the person charged with negligence must be reasonably charged with such knowledge, or must have had an opportunity to acquire knowledge by the exercise of reasonable diligence.

Applying these same principles to KRS 278.990, the Commission may impose a penalty upon a utility for failing to comply with a regulatory requirement if the Commission finds that the utility knew or, with the exercise of reasonable diligence, should have known that the violation existed.

Conclusion

There is no question that the wires maintained by the utilities were not in compliance with Commission regulations. Thus, the only issue concerning the utilities' culpability is whether they knew or should have known of the violations.

Both utilities maintained that even though they conducted periodic inspections of the overhead wires as required by Commission regulation, they were unaware that the wires were in violation of the safety code and had no knowledge of facts which would reasonably have put them on notice of the violation. Given the fact that the violations were certainly in existence prior to the most recent inspections conducted by the utilities, their position is untenable.

Meade County RECC conducted its inspections by helicopter, a method that is unacceptable to the Commission. While such an inspection would reveal some defects in the line, the inspector making an aerial inspection would not be able to determine whether the electric lines were maintaining an adequate vertical clearance above the ground. Thus, Meade County RECC did not exercise reasonable diligence in relying upon aerial surveillance by helicopter as the means of inspecting its overhead wires.

Furthermore, Meade County RECC, through its employees, was given actual notice of the condition of the overhead wires. Prior to the accident, both Heidi Riggs and Joseph Rosebush each informed Meade County RECC that its overhead wires were low at the site where the accident occurred. Despite the notification, Meade County RECC failed to take any corrective action. Thus, Meade County RECC was in violation of Commission regulations and under the circumstances a penalty of \$1000 would be appropriate.

Brandenburg Telephone is also in violation of the Commission's regulations. Although Brandenburg Telephone made its inspections by foot, it is obvious again from the length of time that the violation existed that the inspections were not adequately performed. For its violation a penalty of \$200 would be appropriate.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. Meade County RECC is hereby determined to be in violation of 807 KAR 5:041, Section 3, for maintaining inadequate vertical clearance for its overhead lines.

2. For such violation, Meade County RECC be and it hereby is assessed a penalty of \$1000.

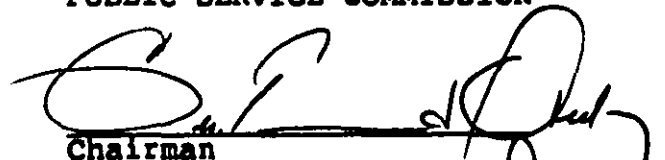
3. Brandenburg Telephone is hereby determined to be in violation of 807 KAR 5:041, Section 3, for maintaining inadequate vertical clearance for its overhead lines.

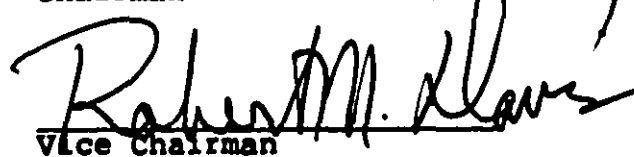
4. For such violation, Brandenburg Telephone be and it hereby is assessed a penalty of \$200.

5. Said penalties shall be due within 20 days of the date of this Order. Payment shall be made by certified check or money order made payable to Treasurer, Commonwealth of Kentucky. Said check or money order shall be mailed or delivered to the Office of General Counsel, Public Service Commission, 730 Schenkel Lane, P. O. Box 615, Frankfort, Kentucky 40602.

Done at Frankfort, Kentucky, this 17th day of September, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director